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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 343

CLARENCE J. THOMPSON,

Petitioner,

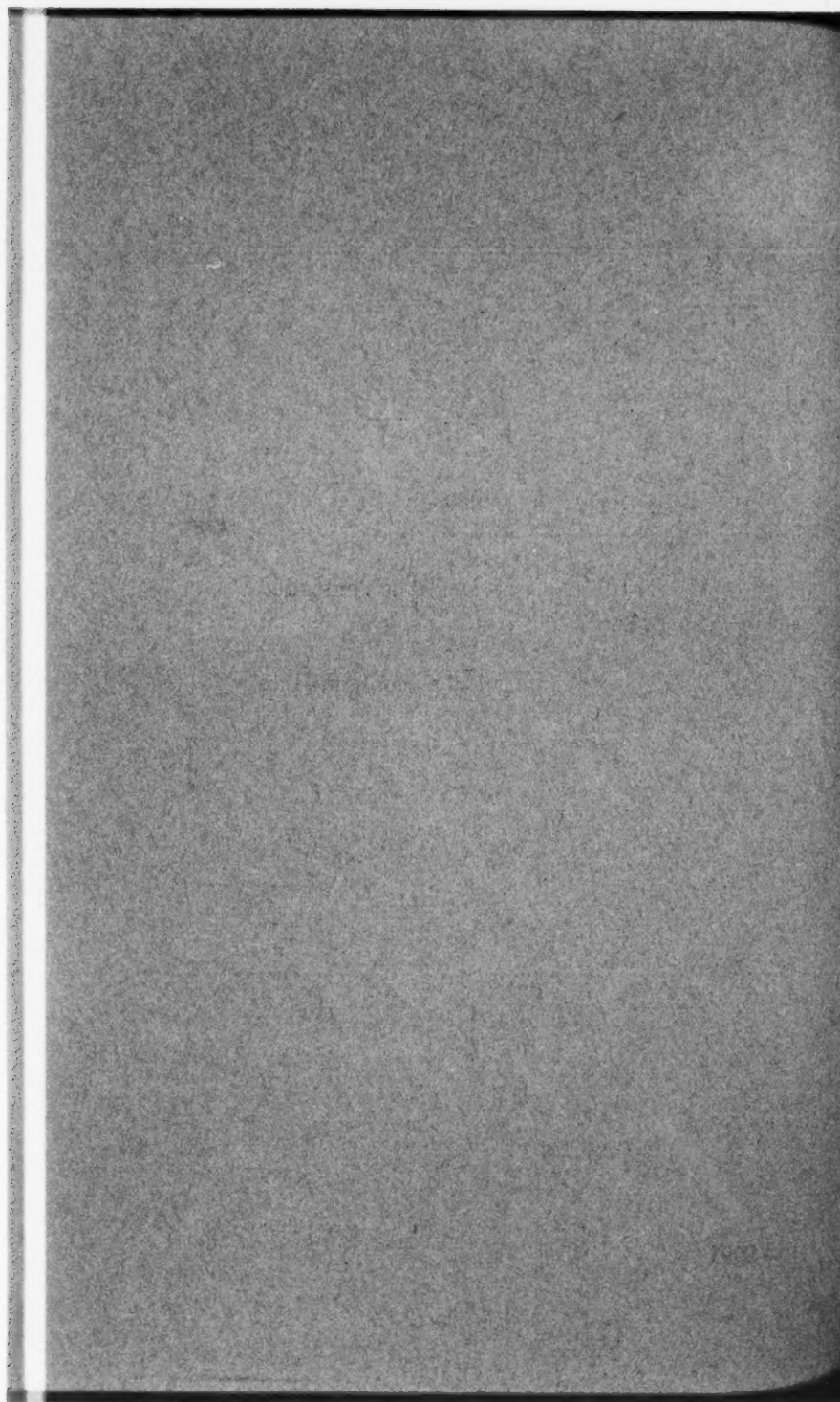
vs.

THE STATE OF GEORGIA.

PETITION FOR REHEARING.

THOMAS HOWELL SCOTT,
Counsel for Petitioner.

ROBT. B. BLACKBURN,
H. A. ALLEN,
Of Counsel.



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vs.

Petitioner,

THE STATE OF GEORGIA.

PETITION FOR REHEARING.

Comes now Clarence J. Thompson and presents his petition for rehearing in the above entitled cause and prays that the court reconsider its action in denying the petition of Clarence J. Thompson for the writ of certiorari, by order of the court as passed in said matter, of date, October 19, 1942, and in support thereof respectfully shows:

Part One—Prelude.

In presenting this application for rehearing, it is rather difficult to forecast the theory upon which the petition for certiorari in the instant case was denied.

The court having failed to write an opinion, it is only possible for counsel to suggest to the court some of the pertinent facts which the court evidently overlooked and also suggest the possibility of its having overlooked what

we most earnestly contend—controlling decisions, statutes and provisions of the Constitution of the State of Georgia, and of the United States as applicable.

1st.

We contend that a citizen of the United States has been placed in jeopardy a second time for the same offense.

2nd.

We contend that for the first time in the history of our system of criminal procedure, a court of last resort has entertained and granted the state the right of appeal from one of its own decisions, in contravention of express provisions of the Constitution of the United States, hereinafter specifically set forth.

Part Two.

Specific reference to parts of the record to which the Court's attention is called:

Thompson, the petitioner, was indicted by a grand jury and charged with an offense made penal by the laws of the State of Georgia (R. 7 to 12).

Before arraignment and before waiver of arraignment and before plea, Thompson filed his demurrer to the indictment (R. 12).

The demurrer was by the court overruled (R. 17).

Exceptions pendente lite were filed to the order of the Court overruling the demurrer (R. 17).

Thompson, after the order overruling the demurrer, waived arraignment and entered plea of not guilty (R. 12).

The case proceeded to trial and Thompson was found guilty of the offense as charged (R. 19).

The defendant was sentenced to penal servitude (R. 19).

And Thompson was placed in jeopardy the first time.

Thereafter Thompson filed his motion for new trial and the same was by the court denied (R. 18 & R. 22).

A writ of error was filed, excepting to this order of the court overruling the motion for new trial and assigning error upon exceptions pendente lite to the order of the court overruling the demurrer of Thompson and the case was appealed to the Court of Appeals of the State of Georgia (R. 1 to 6).

The Court of Appeals of Georgia rendered its decision and Reversed the judgment of the lower court, because the court erred in not quashing the indictment (R. 22).

We contend that this judgment of the Court of Appeals in reversing the judgment of the lower court because the court erred in not quashing the indictment, was in law, an acquittal of the defendant, Thompson.

Thereafter the State filed a motion for rehearing and prayed that the Court of Appeals of Georgia reconsider its former opinion and reverse itself (R. 22-27).

Thompson filed a motion to dismiss the motion of the State for rehearing (R. 27).

Thereafter, the Court of Appeals of Georgia, upon considering the motion for rehearing, entered judgment vacating its former judgment in which the lower court had been reversed (R. 32) and on the same date entered judgment affirming the judgment of the lower court finding Thompson guilty of the offense as charged (R. 32 to 47).

And we contend that by this second judgment of the Court of Appeals of Georgia, the defendant, Thompson, was placed in jeopardy a second time for the same offense; and we most earnestly contend that the court in refusing to grant the petition for certiorari evidently overlooked these uncontradicted facts.

Part Three.

Argument and Citation of Authorities.

Being placed in jeopardy more than once is a violation, not only of the Constitution of the State of Georgia as

incorporated in Article 1, Section 1, Paragraph 8 of the Constitution of Georgia, which provides:

“No person shall be put in jeopardy of life or liberty more than once for the same offense, save only on his or her own motion for a new trial, or in the case of mistrial. (See Code of Georgia 1933, Section 2—108.)

But, is also in violation of amendment 8—article 5 of the Constitution of the United States, which provides:

“That no person be subject for the same offense, to be twice placed in jeopardy for the same offense.

Clearly, Thompson, in the instant case was placed in jeopardy when tried in the State Court upon the indictment as returned and upon a verdict being rendered in the power court (R. 19).

When the case was appealed to the Court of Appeals of Georgia, by a writ of error (R. 1 to 6) the Court of Appeals of Georgia only considered so much of the record as related to the assignment of error on exceptions pendente lite, excepting to the order of the lower court—overruling the demurrer as filed to the indictment.

For the judgment of the Court of Appeals of Georgia, in its judgment of reversal, limited its decision to the sole question as to whether the demurrer was good or bad:

The judgment of reversal being in language as follows:

“C. J. Thompson vs. The State.

Judgment Jan. 16, 1942.

This case came before the court upon a writ of error from the Superior Court of Fulton County and after argument had, it is considered and adjudged that the judgment of the court below be reversed, because the court erred in not quashing the indictment” (R. 22).

This judgment of reversal was final and complete and did not consider any other issue as raised by the bill of exceptions and was an acquittal for Thompson.

This court has repeatedly held that a judgment sustaining the demurrer and quashing the indictment in a criminal case amounts in law to an acquittal.

Petitioner calls the Court's especial attention to this contention: The case of:

Keifer v. The United States

reported in 195th U. S. Reports, page 128 *et sequa*, wherein on page 130, the court holds:

"It is then the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered although no judgment be entered on the verdict."

The judgment of the Court of Appeals of Georgia in reversing the judgment of the lower court because the lower court erred in not quashing the indictment was an end to the case and the defendant was acquitted and the Sovereign State lost jurisdiction.

It was not necessary for the mandate of the Court of Appeals of Georgia to be transmitted to the lower court for the completion of the record, and the defendant, Thompson, stood, in law in the same position as if his demurrer had been sustained in the lower court.

When the Court of Appeals of Georgia entertained a motion on the part of the State for a rehearing (R. 22) and entered a judgment reversing its former judgment (R. 32-41) and affirmed the judgment of the lower court finding Thompson guilty, unquestionably placed the defendant in jeopardy a second time in controvention of and in violation of the Constitution of the State of Georgia and the provision of the Constitution of the United States as set out, and this decision of itself, raised a *Federal* issue.

But, says the State in its brief on file in the instant case that Thompson did not invoke protection under either State

or Federal Constitution when the case was before the Court of Appeals.

In reply to this contention, we can say with absolute confidence that up to the time at which the Court of Appeals of Georgia rendered the decision of April 3, 1942 (Record 32) that there were no constitutional questions involved.

The first invasion of constitutional right was in the decision of the Court of Appeals of date April 3, 1942, which is the decision complained of and excepted to in the petition for certiorari now being considered.

Until this decision was rendered, Thompson could not, by the wildest stretch of speculative thought, conceive of such a judicial jump.

However, Thompson moved swiftly upon the heels of the decision as rendered and made an attempt to have this adverse decision reviewed and reversed, by filing a petition for certiorari directed to the Supreme Court of Georgia (R. 40 to 60). In this petition for certiorari, Thompson assigned as error and contended in part:

First. That the Court of Appeals erred in holding and deciding that the State of Georgia could file a motion for rehearing in a criminal case, which has been decided against the State and in denying the motion of petitioner to dismiss the motion for rehearing by the State of Georgia (R. 54).

Second. That the judgment of the Court of Appeals was in contravention of Article 1—Paragraph 8 of the Constitution of Georgia, which provides: "No person shall be put in jeopardy more than once for the same offense."

The petition for certiorari presented to the Supreme Court of Georgia was denied—there was no opinion (R. 49).

Thereafter Thompson filed a motion for rehearing in the Supreme Court of Georgia and this motion for rehearing

was denied (R. 60). And still, there was no opinion by the court.

Thompson exhausted all efforts available in an attempt to have the courts of last resort in the State of Georgia to review :

And Thompson comes now to the Supreme Court of the United States by petition for certiorari and at the first available opportunity, excepts to the final judgment of the Court of Appeals of Georgia, which in and of itself involves the constitutional right of the citizen.

The effort to have the exceptions as set forth in his petition for certiorari in the Supreme Court of Georgia were broad enough to comply with the rule of law invoking Federal questions as a condition precedent to bringing the case to the Supreme Court of the United States by petition for certiorari.

The Supreme Court of the State of Georgia having failed to write an opinion in considering the petition for certiorari, left the judgment of the Court of Appeals as a final judgment of a court of last resort and to this decision Thompson excepted by petition for certiorari filed in the instant case and we contend that this petition for certiorari now under review raises Federal issues and Constitutional questions involving the right of the citizen within the purview of Section 237—Judicial Code (U. S. C. A. Title 28—Section 344 (B)).

By the decision of the Court of Appeals of Georgia as excepted to:

Thompson was deprived of his liberty without due process of law. Thompson was placed in jeopardy a second time for the same offense, and was deprived of privileges and immunities guaranteed to him under the Constitution of the United States as set forth in Amendment 8 Article 5 of the Constitution and as guaranteed to him under the 14th Amendment of the same paper.

We again call the Court's especial attention:

That in a criminal case in which a defendant has prevailed, the State has no right of appeal.

This contention is so thoroughly supported by a long line of state and Federal decisions as constrains us, in the belief that in denying the petition for certiorari in the instant case, the Court evidently overlooked this most substantial thought.

We again call the court's especial attention to the case of: *United States vs. Sanges*, 144th U. S. 310.

In which it was expressly ruled that in a criminal case the Government has no right of Appeal.

We are aware that under statute law of the United States, the government is given the right to go by direct writ of error to the Supreme Court of the United States in criminal cases, wherein the demurrer relates to form or substance, in the event that the demurrer is sustained, but this right is limited to demurrer, filed to the indictment before arraignment and plea, but even under this statutory provision the defendant is given freedom on his own bail, pending the appeal.

This statutory provision does not conflict in anywise with the position taken by counsel in the instant case, but rather gives emphasis to the thought:

That under Federal law when a demurrer to an indictment is sustained the defendant stands as a matter of law, acquitted.

So, it follows as surely as night succeeds the day, that when the Court of Appeals of Georgia in the instant case, reversed the judgment of the lower court—because the court erred in not quashing the indictment, that Thompson was acquitted and the court could not again call the defendant into jeopardy at the instance of the State by a motion for rehearing.

There has never been (so far as we have been able to ascertain) a decision rendered by a court of last resort affirming the right of the State to grant a rehearing in a criminal case—in the absence of express statute conferring such authority and it is not contended that there was any statutory law in force in the State of Georgia giving such right.

Counsel for the state, in their Brief cites a wealth of cases in an effort to sustain the unusual decision as now under review, but a careful review of these cases will disclose that the only ones that deal with the exact question are from forums wherein the sovereign was granted express statutory right and these cases are not germane or helpful.

Counsel for the State in their brief devote much space in discussing the merits of the case as it is related to the guilt or innocence of the defendant, and also discuss at length as to whether the indictment was good or bad and unnecessarily encumber the record with matter not germane.

It must be borne in mind that the question as to whether the defendant was guilty or innocent is not before this court for review.

Nor is the question as to whether the indictment was good in law or bad before the court.

The sole question is whether the first decision of the Court of Appeals of Georgia reversing the lower court—because the court below erred in not quashing the indictment, could be reviewed by the State.

The decision of the Court of Appeals of Georgia as excepted to invades the sanctity and integrity of the law of criminal procedure and should not be allowed to stand even as a quasi precedent.

We feel confident that the case now submitted is of such gravity and raises issues of such concern as to justify the hope that this Court will conclude that this petition for rehearing should be granted and the petition for certiorari sanctioned.

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Certificate of Counsel.

I, Thomas Howell Scott, counsel for the above named Clarence J. Thompson, petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

This the 31st day of October, 1942.

THOMAS HOWELL SCOTT,
Counsel for Petitioner.

